RE KUAN SHIN; EX P CHIN FOH TRADING SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[ORIGINATING SUMMONS NO: D5-24-442-2006]
4 DECEMBER 2008

CIVIL PROCEDURE: *Contempt of court - Committal proceedings - Breach of interim restraining order - Filing of originating summons in court - Declaratory order sought - Whether amounted to contempt*

This was a motion by the applicant to commit the respondent to prison for contempt for commencing an Originating Summons ('OS') against the applicant, thereby contravening a Restraining Order ('RO') granted to one Chin Foh Bhd ('CF') and its subsidiaries, of which the applicant was one. For the period of the RO, all proceedings against CF and its subsidiaries were to be stayed for a scheme of compromise and arrangement proposed between CF and its subsidiaries to be decided upon. The applicant had obtained a loan from the respondent but was unable to settle it within a certain period. It then assigned to the respondent some debts owed to it by some other companies. Subsequently, the applicant, in order to refrain from returning the loan amount to the respondent, made a public announcement declaring the assignment null and void. The issue requiring determination was whether the respondent's application in the OS to the court for a declaratory order amounted to contempt of court.

Held (dismissing the applicant's motion):

(1) The respondent's application in the OS was, on the facts, nothing more than a defensive action against the applicant's announcement in the Bursa Saham Malaysia and the Star newspaper that the applicant's Board of Directors had rescinded the debt assignment and had rendered it null and void. It was not a proceeding against the applicant as for the purpose for which the RO was granted. The respondent's action in seeking the said declaration from the court clearly did not in any way interfere with the administration of justice or the course of justice insofar as the applicant's case was

A concerned. The respondent's action was done in the ordinary course of business with no malice meant to the applicant or to frustrate the restructuring proceedings as the respondent was merely seeking the assistance of the court to remedy an injustice inflicted upon him by the applicant. The respondent
B needed to seek a declaration from the court as to the validity of the debt assignment. On the above considerations, the respondent's conduct in filing the OS in court did not amount to an act of contempt. (paras 4, 15, 16 & 17)

C **Case(s) referred to:**
Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd [2001] 4 CLJ 549 CA ***(refd)***
Rahmat Ali Fatehullah v. Calcutta National Bank Ltd AIR [1955] (All) 169 ***(refd)***
Tay Seng Keng v. Tay Ek Seng O Sdn Bhd [1978] 1 MLJ 126 ***(refd)***
D *Thakur Lal v. Mahabir Prasad AIR [1955] 391* ***(refd)***
Teh Guan Teik v. Inspector General of Police & Anor [1998] 3 CLJ 153 FC ***(refd)***
Young v. Sherman [2002] 20 ACLC 149 ***(refd)***

E **Legislation referred to:**
Companies Act 1965, s. 176(10)
Rules of the High Court 1980, O. 15 r. 16

Corporations Act 2001 [Aust], s. 440D

F *For the applicant - CM Owee; M/s HK Ang & Partners*
For the respondent - John Henry; M/s John & Assoc

Reported by Suresh Nathan

G

JUDGMENT

Ramly Ali J:

[1] Enclosure 43 in the applicant's motion to commit the
H respondent to prison for contempt.

[2] The alleged contempt cited by the applicant against the respondent is that the respondent had on 6 July 2007 commenced an Originating Summons (No. S4-24-1726-2007) (the "OS") against the applicant whereby contravening the restraining order
I dated 9 March 2007 which was extended until 11 September 2007 pursuant to s. 176(10) of the Companies Act 1965.

[3] The nature of the order is as an interim order that was granted to Chin Foh Berhad and its subsidiaries, the applicant being one of the subsidiaries on 9 March 2007 which was extended until 11 September 2007 pursuant to s. 176(10) of the Companies Act 1965. *Inter alia* all proceedings against Chin Foh Berhad and its subsidiaries including the applicant company be restrained and stayed for the period of the order for a scheme of compromise and arrangement proposed between Chin Foh Berhad and its subsidiaries including the applicant company and its creditors to be decided upon.

Finding Of Court

[4] The respondent's application in the said OS for a declaratory order to the court is nothing more than a defensive action against the announcement made in the Bursa Saham Malaysia and the Star newspaper that the Board of Directors of the applicant had on 14 December 2005 rescinded the debt assignment and had rendered it null and void. It is not a proceeding against the applicant company as for the purpose of the order was granted.

[5] In the Indian case of *Rahmat Ali Fatehullah v. Calcutta National Bank Ltd.* AIR [1955] (All) 169, the court held that in a defensive action no leave for any defensive proceedings on its part would be necessary.

[6] The said OS filed by the respondent is a proceeding to the validity of the debt assignment and it is not a proceeding "against" the company. It is only a proceeding of declaratory orders in respect of the applicant's company and its affairs, to which it is proper to join the applicant company so that it is bound by the declaratory decision made thereupon whereby in the OS there is no relief is sought with respect to any particular property in the applicant's company.

[7] The court makes reference to the New South Wales Supreme Court case of *Young v. Sherman* [2002] 20 ACLC 149 at p. 159 which dealt with s. 440D of the Australian Corporations Act 2001 equivalent to our s. 176(10) of the Companies Act 1965 where the court held:

> In my opinion, those words do not require such a wide construction. A proceeding to challenge the validity of a deed of company arrangement or to terminate it is not in any substantive sense a proceeding "against" the company. It is better characterized as a proceeding in respect of the company and its affairs, to which it is proper to join the company so that it is bound by the decision. Nor, in my opinion, is such a proceeding one "in relation to any of the property of the company. It is true that a deed of company arrangement affects the property of the company, and therefore its invalidity or termination is, in one sense, "in relation to" the company's property. However, in such a proceeding no relief is sought with respect to particular property, and so on a natural construction of the statutory words, a proceeding in relation to the company's property.
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> ...
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> In summary, my opinion is that leave is not required under either s. 440D(1) or s. 44E(3), because the present proceeding is not against the company or in relation to any of its property. It is therefore unnecessary for me to make any order granting leave to the Plaintiffs to commence or continue the present proceeding.

[8] In the said OS the respondent is merely seeking to a court of law which is open to him in lawful manner as empowered by the statute in accordance with s. 15 r. 16 of the High Court Rules 1980 in seeking a declaratory judgment that the debt assignment is valid and enforceable and that the advertisement published in the Star newspaper is void. It doesn't constitute a contempt of court.

[9] No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of rights whether or not consequential relief is or could be claimed. Order 15 r. 16 is statutory authority for a right to sue by declaration, and as if to exalt such right, it says it shall not be open to objection even if no consequential relief is sought. (See: *Teh Guan Teik v. Inspector-General of Police & Anor* [1998] 3 CLJ 153 – Federal Court).

[10] In the Indian contempt case of *Thakur Lal v. Mahabir Prasad* AIR [1955] 391 (All), the court stated that "it is clear, therefore that if a person takes legal action in a court of law which be open to him, he cannot commit contempt of court unless the

action be held to be not an approach to the court for redress of the wrong but was really such as can be said to be abusing the process of the court".

[11] The said OS order is only an interim order thus operates as a temporary order whereby there is a risk that the scheme of arrangements of the applicant company under the s. 176 of the Companies Act can fail and that it will prejudice the respondent right and interest in the debt assignment.

[12] The court refers to the Federal Court case of *Tay Seng Keng v. Tay Ek Seng O Sdn Bhd* [1978] 1 MLJ 126, where Gill CJ, delivering the judgment of the court, stated:

> The order which the appellant was alleged to have failed to comply with was an interim order. The action is yet to be tried for the final orders to be made. In all the circumstances of the case we felt that the appellant's imprisonment for contempt of Court could not be sustained. We therefore allowed the appeal and set aside the order of the Court below.

[13] The OS application for the said declaration to the court by the respondent in no way hampered or adversely affected a fair and proper trial of the pending proceedings for the scheme of arrangement. Alternatively, the respondent is merely seeking a declaratory order for the court to determine that the debt assignment is valid and enforceable and that the advertisement published in the Star newspaper is void. The respondent is not seeking any relief against any property of the applicant to affect a fair and proper trial of the pending scheme of arrangement.

[14] Whether an act amounts to an interference with the due administration of justice or the course of justice and therefore contempt, or not, depends on the circumstances of each case. The act must be sufficiently serious and sufficiently connected with the particular proceedings. The court will have to consider whether the acts is done in good faith, in the ordinary course of business or whether it is one with a view to frustrate the proceedings thus rendering any subsequent order of Court ineffective and fruitless." (See: *Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd* [2001] 4 CLJ 549 – Court of Appeal).

[15] In the instant case, the action by the respondent in seeking the said declaration from the court clearly does not in any way interfere with the administration of justice or the course of justice in so far as the applicant's case is concerned. It is also not sufficiently serious and sufficiently connected with applicant's restructuring process in court. Further, the respondent's action was done in the ordinary course of business with no malice meant to the applicant or to frustrate the restructuring proceedings as the respondent was merely seeking the assistance of the court to remedy an injustice inflicted upon him by the applicant.

[16] The respondent had fallen victim to the applicant's conducts whereby the respondent was approached for a loan by the applicant. The loan was to be settled within a certain period. Unable to do so, the applicant assigned to the respondent some debts owed to them by some other companies. Subsequently, the applicant, in order to refrain from returning the loan amount to the respondent, and by way of a public announcement, declared the assignment as null and void thereby causing much hardship to the respondent to enforce the assignment. Hence, the need for the respondent to seek a declaration from the court as to the validity of the assignment. Clearly, a situation such as this cannot amount to a contempt of court.

Conclusion

[17] On the above considerations, the court finds that the respondent's conduct in filing the said OS in court for the said declaration does not amount to an act of contempt as alleged by the applicant. Therefore the applicant's motion (encl. 43) to commit the respondent to prison for contempt is dismissed with costs.